IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

FILED

SEP 25 2003

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA
BY _______ DEPUTY

U.S. SECURITY, et al.,

Plaintiffs,

vs.

FEDERAL TRADE COMMISSION,

Defendant.

No. CIV-03-122-W

DOCKETED

ORDER

This matter comes before the Court on the Emergency Motion for Stay Pending Appeal filed by the defendant, Federal Trade Commission ("FTC"), wherein the FTC has sought a stay pending appeal of that portion of the Court's Order of September 23, 2003, that declares invalid those provisions of the FTC's Telemarketing Sales Rule ("TSR") that create a nationwide do-not-call registry. The registry was scheduled to take effect on October 1, 2003. The plaintiffs have responded in opposition to the motion. The FTC has urged the Court to rule on this matter promptly to allow the FTC the opportunity to present the issue to the United States Court of Appeals for the Tenth Circuit prior to October 1, 2003. For this reason, the Court considers this matter without further delay and without permitting the parties the opportunity to appear at a hearing.

Rule 8(a), Federal Rules of Appellate Procedure, provides that "[a] party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal." Tenth Circuit Rule 8.1 requires that an applicant for a stay must demonstrate to the district court (1) the likelihood of success of appeal; (2) the threat of irreparable harm if the stay is not granted; (3) the absence of harm to the opposing parties if the stay is granted; and (4) any risk of harm to the public interest.

A stay is an extraordinary remedy and the right to such relief must be clear. It is designed to preserve the status quo, that is, the reality of the existing state of affairs, pending a final determination of the parties' rights. In this case, the stay requested by the FTC would disturb the status quo and essentially grant the FTC the relief it requested in its Cross-Motion for Summary Judgment.

The Court has considered the likelihood of the FTC's success on appeal. In so doing, the Court is mindful that serious and difficult questions have been presented in this case regarding the FTC's authority to create and maintain a do-not-call registry. However, the arguments advanced by the FTC are the same arguments which the Court considered and rejected when ruling on the parties' Motions for Summary Judgment.

The Court, as required by Rule 8.1, has also balanced the harm to the FTC if a stay is denied against the harm that the plaintiffs will suffer if a stay is not granted. The FTC has contended that if the Court's decision as to the do-not-call registry is not stayed, consumers will continue to receive unsolicited telemarketing calls pending resolution of the FTC's appeal and that there is no effective remedy available to these consumers should the Court's decision be reversed on appeal.

The plaintiffs have responded that they will suffer irreparable harm if the do-not-call registry takes effect despite this Court's ruling because the TSR allegedly infringes upon the plaintiffs' rights under the first amendment to the United States Constitution and because implementation of the registry will inflict immediate economic injury to the plaintiffs' businesses. As to the latter, the plaintiffs have claimed that if a stay is granted and the Court's decision affirmed on appeal, the financial losses they would suffer cannot be remedied by monetary damages because such damages would be difficult to calculate and because the FTC cannot be liable for money damages in this case.

Finally, the Court has considered the public interest. It is clear that public interest favors the grant of a stay as demonstrated by the number of consumers who have registered with the do-not-call registry. It is equally clear, however, that the public interest is served by the denial of a stay that would prevent the enforcement of regulations that exceed an agency's authority.

The Court's Order of September 23, 2003, does not affect any state created do-not-call registries or any company-specific do-not-call lists. They remain in force and effect. Consumers who registered with the national do-not-call registry no doubt have anticipated the implementation of the national do-not-call registry. The denial of a stay will not however deprive them of a benefit that they currently enjoy.

No one factor is dispositive, and the Court has carefully considered the parties' arguments and authorities as to each factor. In so doing, the Court finds the balance of the equities favors denial of the requested stay. Accordingly, the Court DENIES the FTC's Emergency Motion for a Stay Pending Appeal filed on September 24, 2003.

ENTERED this 25TH day of September, 2003.

LEE R. WEST
UNITED STATES DISTRICT JUDGE